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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 575

THE FIRST NATIONAL CITY BANK OF NEW YORK,
Petitioner,

vs.

INTERNAL REVENUE SERVICE OF THE UNITED STATES TREASURY DEPARTMENT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To The Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, The First National City Bank of New York (City Bank), respectfully requests that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Second Circuit, which reversed the order of the United States District Court for the Southern District of New York.

The order of the District Court modified a summons of the Internal Revenue Service (Revenue Service), served pursuant to 26 U. S. C. §§7601-7604 upon Head Office of City Bank, in New York City, by directing: that City Bank need not produce, in New York City, certain books and records of its Panama City branch, located in the Republic of Panama, relating to the account of Atlanta Corporation, Limited (Atlanta), a Panamanian corporation, with offices in New York City and in the Republic of Panama.*

Opinion Below

The opinion of the Court of Appeals is not yet officially reported but is printed in Appendix B to this petition (pp. 1-B–7-B).

The opinion of the District Court is reported in 166 F. Supp. 21 (S. D. N. Y. 1958, Dimock, D. J.), and is printed in Appendix D to this petition (pp. 1-D–3-D).

Jurisdiction

The judgment of the Court of Appeals was entered on November 10, 1959 and is printed in Appendix C to this petition (pp. 1-C–2-C) and in the Record (R. pp. 48a-49a).** The jurisdiction of this Court is invoked under 28 U. S. C. A. §1254(1).

* It should be noted that the Panama branch is located in the Republic of Panama and not in the Canal Zone.

** References to the certified Record are designated "R".

The District Court had jurisdiction of the motion to vacate or modify the summons under 26 U. S. C. A. §7402 and §§7601-7604.

Questions Presented

The questions presented are as follows:

(1) City Bank having established by uncontradicted proof that the production in New York City of the records of City Bank's Panama branch would violate the Constitution, the Judicial Code and the Code of Commerce of the Republic of Panama: did not the Court of Appeals violate the principles of comity which require our courts to respect the laws of a foreign sovereign, and therefore err, when it directed City Bank to produce said records in New York City?

(2) Did not Congress intend to deny to the Internal Revenue Service the right to require the production, in New York City, of records of a foreign branch: in view of the clearly expressed intention of Congress, founded upon sound banking practice and commercial necessity, that foreign branches are to be operated independently and their records are to be kept independently of Head Office?

(3) Did not the Court of Appeals err in reversing the District Court, which held that the records at the Panama branch in the Republic of Panama were *not so within the control* of City Bank's Head Office in New York City as to be subject to production under an Internal Revenue summons served on Head Office?

Constitutional Provisions and Statutes Involved

Pertinent constitutional and statutory provisions are printed in Appendix A to this petition (pp. 1-A-13-A), as follows:

(1) Article 29 of the Constitution of the Republic of Panama; (2) Articles 399-407, 916-926 of the Judicial Code of the Republic of Panama; (3) Articles 88 and 89 of the Code of Commerce of the Republic of Panama; (4) 26 U. S. C. A. §§7602, 7602 and 7604; and 12 U. S. C. A. §§601, 602 and 604.

Summary Statement of Facts

On April 28, 1958, a summons (R p. 23a) was served on City Bank, in New York City, requiring a witness to appear to give testimony and to produce the Bank's entire and complete credit file relating to Atlanta. On May 7, 1958, the Bank complied fully with that summons and produced its entire New York credit file for the Revenue Service (R p. 20a).

Thereafter, the Revenue Service served upon Head Office a new summons, dated June 5, 1958, requiring a witness to appear to give testimony and to produce numerous papers and records therein itemized (R p. 25a). The Revenue Service demanded, moreover, that any of such papers and records which might be located in the Panama Branch of City Bank also be produced (R p. 12a).

Thereafter, City Bank moved to vacate or modify the summons so as to command the production only of those records which were located in New York (R p. 9a). After a hearing the District Court modified the summons accordingly.

The Panama branch is operated independently of Head Office in New York City.

City Bank is a national banking association organized under the laws of the United States. It has its Head Office in New York City, and at the time of the motion to vacate or modify, maintained 59 branches in foreign countries and 11 branches in dependencies or insular possessions of the United States (R pp. 14a-15a). Today the Bank has 68 foreign branches in 25 foreign countries throughout the world, including: England, France, India, Japan, Egypt, Republic of Panama, Mexico, Philippines, Lebanon, Argentina, Brazil, Venezuela and others.*

The Panama branch of City Bank was established on March 26, 1926, under the Federal Reserve Act, 12 U. S. C. A. §§601-604, and has since been operated pursuant to §604 as a distinct business entity, independent of its Head Office in New York (R pp. 14a-18a). The following are some of the salient facts, indicative of such independent operation (R pp. 15a-18a):

(1) Before the Panama branch was permitted by the Republic of Panama, to operate as a bank, it was required to obtain a permit from the Panamanian Government.

(2) The branch is subject to the supervision of and the rules and regulations of the banking authorities of the Republic of Panama.

* It is a matter of common knowledge also that other American banks have numerous foreign branches: Bank of America; The First National Bank of Boston; Morgan Guaranty Trust Company; The Chase Manhattan Bank; Bankers Trust Company; and The Hanover Bank.

(3) The branch pays taxes and license fees to the Panamanian Government.

(4) The branch is and has been under the separate management and administration of an officer in Panama with the title of "Manager", appointed by the Board of Directors of the Bank in New York, with full authority to operate the branch as a separate and independent business unit.

(5) No approval of Head Office is required upon the opening of any deposit account at the branch.

(6) No records of deposits or withdrawals at the Panama branch are kept at Head Office; they are all maintained at Panama.

The Head Office keeps no list of depositors of the branch and no records of transactions in deposit accounts of the branch.

(7) The branch maintains a "current account" with Head Office, with some of the Bank's overseas branches, and also with other banks.

(8) The branch keeps its own reserves; and makes its own loans without approval from Head Office, except with respect to unsecured loans in excess of $40,000 and secured loans in excess of $80,000.

(9) The branch accepts deposits from other banks in Panama and other countries, and also competes with other banks in Panama.

(10) In all essential respects the Panama branch is operated independently of Head Office.

(11) The records of the Panama branch are not so within the control of the Head Office of City Bank as to be subject to production in New York City, by summons served upon Head Office.

These records are in the custody, possession and control of the Manager of the Panama branch.

The Constitution and other Laws of the Republic of Panama prescribe the rules relating to the production and inspection of the records of the Panama branch.

In support of its motion to vacate or modify, City Bank submitted the affidavit of a distinguished expert on Panamanian law, Carlos Icaza, among other things, Chairman of the National Council of Foreign Affairs of the Republic of Panama (R pp. 27a-34a). Icaza is a graduate of the Yale Law School and has been actively engaged in the practice of the law before all the courts, government offices and bureaus in the Republic of Panama for approximately 38 years. The proof regarding Panamanian law, submitted through Icaza, established, *without any contradiction*, the following:

Article 29 of the Constitution of the Republic of Panama declares that correspondence and other private documents in Panama are "inviolable" and are not subject to seizure or examination "except by provision of *a competent authority* and by means of *legal formalities*." (R pp. 29a-30a; App. A, p. 1-A).

The procedure and the conditions under which papers and records of the Panama branch may be inspected in the Republic of Panama are set forth in the Judicial Code and the Code of Com-

merce of the Republic of Panama (R pp. 30a-40a).

In connection with the inspection of papers and records in Panama, the Judicial Code prescribes, among other conditions: that a bond of indemnity must be given; that an application be made to a *Panamanian Court*, and an order of the Court obtained; and that the discovery and inspection be conducted in the presence of the Secretary of the Court and two witnesses appointed by the Court (R pp. 30a-32a; 35a-39a).

The Code of Commerce of the Republic of Panama also requires that an order of a *Panamanian Court* be obtained before an examination of books and records of a bank in Panama will be allowed (R pp. 32a-33a; 40a).

Carlos Icaza unequivocally stated: (1) that production of the records, *by any one*, without the consent of Atlanta or the order of a *Panamanian court* would constitute a violation of the Constitution, Judicial Code and Code of Commerce of the Republic of Panama; (2) that if the Courts of the United States should direct City Bank to produce the records of its Panama branch that would, in effect, be a direction that the Bank ask the officers and employees of that branch to violate the laws of the Republic of Panama;* and (3) that such direction would completely disregard principles of comity normally observed between the courts of different nations (R pp. 29a; 33a-34a).

* Obviously, if the Panama branch produced the documents in violation of the laws of Panama the branch would expose itself to possible *civil liability* in an action brought by Atlanta. This, the Court of Appeals completely ignored and seemed to suggest that only if *criminal sanctions* might attach would the duty of production be avoided (App. B. pp. 6-B fn. 3; 7-B).

Reasons for Granting the Writ

I

The Decision of the Court of Appeals violates principles of comity between the United States and the Republic of Panama.

This case presents an issue of great public importance, turning upon a "question of federal law which has not been, but should be, settled by this court." (Rule 19(1)(b) of this Court) With anti-Americanism sweeping over Latin America, and particularly strong in the Republic of Panama, the principle of comity is not an esoteric concept. The decision of a United States court should not be permitted to "imperil amicable relations" or "vex the peace" between the United States and Panama.

Yet the Court of Appeals has brushed aside the uncontradicted evidence of Panamanian law expert, Carlos Icaza, establishing a violation of the Constitution and laws of Panama, and has resolved the questions presented as though wholly controlled by the sovereign power of the United States, saying, among other things (App. B, p. 6-B, fn. 3):

> "The Bank's expert also points to the disclosure provisions of the Panamanian Code of Civil Procedure. But certainly these procedural provisions do not control disclosure pursuant to a subpoena of the United States pursuant to federal statute."

As to the provision of Article 29 of the Panama Constitution that "Correspondence and other private documents are inviolable and may not be seized or examined except by provision of a *competent authority* and by means of *legal formalities* . . ." the Court of Appeals erroneously held, among other things:

> That "no showing has been made that either the constitution or the laws of Panama or international comity prevent production" (App. B, p. 3-B);
>
> That the *exception* in the Panamanian Constitution with respect to "a competent authority and by means of legal formalities" covers a subpoena issued by "an officer of the United States Treasury Department under the control of a United States court . . ." (App. B, p. 6-B);
>
> That the Constitution did not specify, further, that the *exception* was limited to a Panamanian authority or Panamanian legal formalities (App. B, p. 6-B); and
>
> That the Panamanian Constitution did not specify that the *prohibition* against violation of correspondence and private documents "extended to the sovereign, either Panama or a foreign sovereign" (App. B, p. 6-B).*

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* Obviously, the Judicial Code and the Code of Commerce of Panama indicate, specifically, the meaning of the exception contained in Article 29 of the Panama Constitution with respect to "'a competent authority and by means of legal formalities . . .'" And neither of those Statutes furnish any basis whatsoever for the conclusion of the Court of Appeals that the Courts and the Internal Revenue Service of the United States are comprehended within that exception. See *supra*, pp. 7-8; *infra*, p. 11.

These conclusions, we submit, were wholly unwarranted for, as we have shown, *supra*, the uncontradicted proof set forth in the affidavit of Carlos Icaza, established:

> ". . . under the above provisions, . . . the Panama branch of the Bank cannot produce the books, records and papers of any of its depositors without the consent of the depositor. *Anyone* seeking the production of such books, records and papers, without the depositor's consent, must petition the *local courts in Panama*. . . ." (R p. 33a).

> ". . . the production in New York of any books, records and papers . . . (except pursuant to judicial order issued in a *legal proceeding in the Republic of Panama*), would constitute a direct violation of Article 29 of the Constitution and also would violate the rules of procedure for obtaining an inspection of such books, records and papers . . ." (R pp. 33a-34a).

> "If the Courts of the United States should direct the Head Office . . . to produce and disclose the books, papers and records . . . it would, in effect, be a direction that the Bank's Head Office . . . ask the officers and employees of its Panama branch to violate the laws of the Republic of Panama. Such a direction further would completely disregard the principle of 'comity' observed between the courts of different nations." (R p. 34a).

Our courts have uniformly refrained from directing a person or a corporation to perform an act contrary to the laws of a foreign state to which they are sub-

ject. The general rule is stated in *S. E. C.* v. *Minas De Artemisa*, 150 F. 2d 215, 217 (9th Cir. 1945) as follows (p. 217):

> "The Restatement of Conflict of Laws (§94) summarizes the applicable general rule thus: 'A state can exercise jurisdiction through its courts to make a decree directing a party subject to the jurisdiction of the court to do an act in another state, *provided such act is not contrary to the law of the state in which it is to be performed.*' The proposition thus stated has ample support in the authorities . . ." (Italics supplied)

Speaking of the respect which a sovereign state must give to the acts of other sovereign states, Mr. Justice Clark, in *Oetjen* v. *Central Leather Co.*, 246 U. S. 297 (1917), said (pp. 303-304):

> "'Every sovereign State is bound to respect the independence of every other sovereign State,
>
> . . .
>
> "The principle . . . rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.'"

And we submit that this principle applies just as certainly when the Constitution and laws of the small Republic of Panama have been violated as it would if the Constitution and laws of Great Britain had been violated.

When a bank qualifies a branch to do business in a foreign country it submits to the laws of that country. When the laws of that country prescribe the terms and conditions under which records of the branch may be subpoenaed, head office has no control over such records except as it acts within the framework of the foreign law. If the Internal Revenue Service wishes to examine the Panama records, it should, like City Bank, respect the Constitution and the laws of Panama, and make application as therein provided.

II

The decision of the Court of Appeals is contrary to the intent of Congress: that foreign branches be treated as independent business entities; and that their records be not subject to production in the United States.

Section 604 of Title 12 U. S. C. A. was adopted so that a national bank and each of its foreign branches would be treated as "separate entities . . . as if they were unrelated banks". As the Court of Appeals, Second Circuit, itself said in *Republic of China* v. *National City Bank of New York*, 208 F. 2d 627 (1953), (rev'd on other grounds, 348 U. S. 356), at pages 630-1:

> ". . . The creation of such a branch bank finds its authorization in Section 25 of the Federal Reserve Act, 12 U. S. C. A. §§601-604, which provides: 'Every national banking association operating foreign branches shall conduct the accounts of each foreign branch independent of the accounts of other foreign branches established by

it and of its home office, . . .' *This provision has been interpreted to mean that a national bank and each of its foreign branches are separate entities, to be treated as if they were unrelated banks with respect to business done between them, and for many other purposes.* . . . See also *In re Harris*, D. C. S. D. N. Y., 27 F. Supp. 480; *Bluebird Undergarment Corporation* v. *Gomez*, 139 Misc. 742, 249 N. Y. S. 319; cf. *Marlboro Trust Co.* v. *Elliott*, 4 Cir., 86 F. 2d 315, 316-317. . . ." (Italics supplied.)

The leading case, *In re Harris*, 27 F. Supp. 480 (S. D. N. Y. 1939), decided by Judge Patterson, then a District Court Judge, later elevated to the Court of Appeals, Second Circuit, is in every substantial respect on all fours with the instant case, as the District Court held.

There a subpoena duces tecum was served on The Chase National Bank, in New York, requiring it to produce a transcript of an account at the foreign branch of that bank located at London, England. A referee in bankruptcy had ordered the bank to produce the transcript; and it was, in fact, *actually produced in New York.** Upon reconsideration of his order, however, the referee ruled that the bank was not required, as a matter of law to produce the transcript of this foreign branch account. He certified the question raised by his ruling to the District Court.

* Judge Dimock stated in his District Court opinion (App. D, p. 3-D):

"It is those words [section 604] therefore that give the immunity. I cannot see that they have any less strong tendency to immunize papers when sought by the Government than when sought by a trustee in bankruptcy. *Nor is there any other statute which purports to give the Government any greater power of discovery than a private citizen armed with a subpoena duces tecum.*" (Italics supplied.)

Judge Patterson pointed out that the business conducted by the London branch was separate and distinct from that of the home office of the Chase Bank, stating (p. 481):

> "There was testimony before the referee that the London branch conducts business under regulations laid down by the British banking authorities; that the branch is in charge of a vice-president appointed by the board of directors here; that it keeps a checking account with the main office here, keeps its own reserves and makes its own investments; that it does not ordinarily report to the main office on details of operations; that the only information concerning its accounts with depositors which is on hand at the main office is a list of the names of depositors."

Judge Patterson then held that under the Federal Reserve Act (12 U. S. C. A. Section 604) the head office of a national bank has no *legal* control over the records of its foreign branches, and upheld the referee's ruling, saying (p. 481):

> ". . . The question then is whether a bank with its main office here may fairly be said to have control of papers kept at a foreign branch concerning a customer's account with the branch.
>
> The authority for maintenance of foreign branches by national banks comes from the National Banking Act. 12 U. S. C. A. §§601-604. The Act provides in section 604 that a bank with foreign branches 'shall conduct the accounts of each foreign branch independently of the accounts * * * of its home office.' *This enactment recognized and reinforced what had already been the*

rule by business practice and commercial necessity. In many respects a foreign branch, while in last analysis an agency of the bank is treated, in the words of Judge Hough, as 'a separate business entity.' Pan American Bank & Trust Co. v. *National City Bank,* 2 Cir., 6 F. 2d 762, 767. See also *Chrzanowska* v. *Corn Exchange Bank,* 173 App. Div. 285, 291, 159 N. Y. S. 385; *Rex* v. *Lovitt* [1912] A. C. 212, 219. The account of a customer of a foreign branch has been held, properly it would seem, not subject to attachment or garnishment by process served on the bank at the home office. *Bluebird Undergarment Corporation* v. *Gomez,* 139 Misc. 742, 249 N. Y. S. 319; *Richardson* v. *Richardson,* [1927] P. 228.* Under the Uniform Bank Collection Code, enacted by many states including New York, a branch is deemed an independent bank for collection purposes. *Marlboro Trust Co.* v. *Elliott,* 4 Cir., 86 F. 2d 315. While of course the ultimate power as well as responsibility in respect to operations of the branch must rest with the bank itself, the fact that by section 604 the accounts of a foreign branch are to be conducted 'independently' of the home office leads to the conclusion that the records of a depositor's account with a foreign branch, not kept here, *are not so within the control of the main office here as to be subject to production by subpoena duces tecum served here.*" (Italics supplied)

The Panama branch of City Bank, as has already been established (*supra*, pp. 5-7), is and has been operated in practically the same manner as the Lon-

* [1927] Law Rep., Probate Div., p. 228.

don branch of the Chase National Bank. We submit, therefore, that the law enunciated by Judge Patterson in the *Harris* case should control here.

Moreover, recently, in *United States* v. *Kyle*, 21 F. R. D. 163 (E. D. N. Y. 1957), the United States served subpoenas duces tecum upon the Royal Bank of Canada, in New York, calling for the production of certain records of the Royal Bank in one of its branches at Halifax, Canada. Following the *Harris* case, the Court there held (p. 164):

> ". . . that *branch banks are excepted* from the rule that a corporation, properly served with a subpoena, must produce its books and records pursuant thereto, even if the said books and records are located outside the jurisdiction, the reason for such *exception* being that each branch is an independent entity and has control of its own records." (Italics supplied)

Further, in *McGrath* v. *Agency of Chartered Bank of India, Etc.*, 104 F. Supp. 964 (S. D. N. Y. 1952), affd. on appeal to Court of Appeals, 2nd Cir., "on the opinion of the Court below," sub nom. *McGranery* v. *Agency of Chartered Bank of India, Etc.*, 201 F. 2d 368, 369 (1953), Judge Kaufman held: that there is nothing *innately unitary* about the organization of international banks and pointed out a variety of purposes for which branches have been held to be independent entities, including service upon head office of a subpoena duces tecum calling for the production of records of one of its foreign branches. He wrote (pp. 967-68):

> ". . . branches or agencies of an international bank have been held to be independent entities

for a variety of purposes . . . (c) subpoena duces tecum on foreign branch bank's records barred; *In re Harris*, D. C. S. D. N. Y. 1939, 27 F. Supp. 480; . . ."

Further, it will be noted that Judge Patterson in *In re Harris* (*supra*, p. 14) realistically recognized that business and commercial necessity require that accounts of foreign branches be kept independent of Head Office and be not subject to subpoena served on Head Office. Referring to 12 U. S. C. A. Section 604, Judge Patterson said (p. 481):

". . . This enactment recognized and reinforced what had already been the rule by business practice and commercial necessity. . . ."

The Federal Reserve Act (12 U. S. C. A. Section 601) under which the Panama branch was established, expressly states that the purpose of Congress in allowing establishment of foreign branches was "for the furtherance of the foreign commerce of the United States."

But if the 68 branches of City Bank, located in 25 foreign countries throughout South America, Europe and the Far East, and the foreign branches of all other American banks, be made subject to subpoenas served on Head Office an onerous and costly burden will be placed upon the operation of all foreign branches.* Each time a summons or subpoena duces

* Obviously if an Internal Revenue summons can reach records of foreign branches, a subpoena duces tecum issued in any action, in any court, will have the same effect. See footnote *supra* p. 14.

tecum is served upon Head Office with respect to a depositor's account, City Bank, for example, will be compelled, in the absence of a specific limitation in the summons or subpoena, to check the records not only of its 76 domestic branches, but also by cable communication and otherwise, the records of its 68 foreign branches. And if any of City Bank's foreign branches has such account, that branch will be compelled to assemble and transmit to New York, the requested records.

Further, the Government has made it abundantly clear that what it demands is the enforcement of a "summons requiring a *witness* to appear and bring [to New York] books and records physically located outside the United States." If such summonses and subpoenas were to be enforced representatives of City Bank's foreign branches, located perhaps in India, or Japan, or other distant places, would obviously have to accompany the books and records to the United States in order to identify them. This would be highly disruptive of normal banking operations, and would impose a most unreasonable and expensive burden upon foreign branch operations.*

Moreover, the intent of Congress to further the "foreign commerce of the United States" will suffer a serious defeat if foreign branches should be forced to close their doors in conformity with the following admonition of the Court of Appeals (App. B, p. 7-B):

"If the Bank cannot, as it were, serve two

* Yet the Court of Appeals stated that City Bank's contention that power to enforce the subpoena would conflict with sound banking policy was so lacking in substance as to deserve no discussion (App. B, p. 5-B, fn. 2).

masters and comply with the lawful requirements both of the United States and of Panama, perhaps it should surrender to one sovereign or the other the privileges received therefrom."

Prior to 1913, the banking authorities did not have adequate power under the provisions of the National Bank Act to examine into the banking affairs of national banks. The House Committee on Banking and Currency accordingly felt impelled to urge more rigid examination requirements for national banks and their branches (House Report, p. 31).*

With the establishment of branches of national banks in foreign countries, Congress, therefore, provided in 12 U. S. C. A. Section 602 that the *condition* of such branches should be under the examination and close supervision of the Comptroller of the Currency and the Federal Reserve authorities. That section provides in part:

> "Every national banking association operating foreign branches shall be required to furnish information concerning the condition of such branches to the Comptroller of the Currency upon demand, . . . and the Board of Governors of the Federal Reserve System may order 'special examinations' of the said branches . . . at such time or times as it may deem best."

But Congress never granted, either expressly or by implication, to the *Revenue Service*, by summons

* Report No. 69, House of Representatives, 63rd Congress, 1st Session, hereinafter referred to as the "House Report."

issued in aid of an investigation of alleged income tax violations by a third party, power to compel production in New York of the records of a foreign branch.* Certainly such power is not to be implied from the fact that Congress did provide for close examination and supervision of the *condition* of foreign branches by the Comptroller of the Currency and the Federal Reserve Board.

The Court of Appeals obviously erred, therefore, when it concluded that such power of examination and inspection of the *condition* of foreign branches automatically extended "to examinations by, and disclosures to, fully authorized officers of the United States Government", such as Internal Revenue Agents investigating an alleged income tax violation by a third party (App. B, p. 7-B).

Conclusion

The decision of the Court of Appeals is in derogation of the sovereignty of the Republic of Panama, and if allowed to stand may well further aggravate already disturbed relations between the United States and Panama. Moreover, the decision is contrary to the express intent of Congress to further the foreign commerce of the United States, in that it places an unreasonable and highly onerous burden upon foreign branch operations. Clearly, questions of great public

* See Judge Dimock's opinion (App. D, p. 3-D) in which he said: "The Government makes much of section 7602 of title 26 under which it proceeds but that section does no more than give to the Government during the course of its investigation rights to the production of papers similar to the rights possessed by the *Harris* case's trustee in bankruptcy armed with a subpoena duces tecum."

importance, never before determined by this Court, are here presented. We submit that the writ should be granted.

Respectfully submitted,

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Of Counsel

December 8, 1959

APPENDIX A

Pertinent Constitutional and Statutory Provisions

(1) English Translation of Article 29 of the Constitution of the Republic of Panama

(*Published in Pamphlet Form [Official Edition, March 1, 1946] p. 9.*)

"Correspondence and other private documents are inviolable and may not be seized or examined except by provision of a competent authority and by means of legal formalities. In all cases discretion shall be observed about matters foreign to the object of the seizure or examination.

Inspection of papers shall always be performed in the presence of the interested party or of a member of his family or, in their absence, of two reputable neighbors of the same place."

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(2) English Translation of Articles 399 to 407 of the Judicial Code of the Republic of Panama

"SECTION THIRD

DISCOVERY AND INSPECTION PROCEEDING"

"Article 399.—A discovery and inspection proceeding is that which a party to a court action brings, asking the tribunal to carry out, either in suit or prior to a suit, an inspection of the subject matter of the suit, or of the books, documents or other things which may be in possession of the actual or presumptive defendant, of the plaintiff, or of third parties, and which the petitioner deems conducive to

(2)—English translation of Articles 399 to 407 of the Judicial Code of the Republic of Panama

proving or to make effective his rights, actions or exceptions."

"Article 400.—When the discovery and inspection proceeding is granted the inspection must be decreed, and it must take place on the same date without hearing the opponent or the holder of the subject matter of the suit, provided that the petitioner gives guarantee or bond to the satisfaction of the tribunal in order to indemnify for all of the damages which may be caused through the discovery and inspection proceeding."

"Article 401.—The court order providing for the inspection tacitly bears with it the order of entry to carry out the inspection; but the inspection shall not extend in any case to the searching of the domicile of the person who denies that he has the thing or document, the inspection of which is asked."

"Article 402.—After the inspection has been ordered, the court shall carry it out in the presence of the Secretary (of the court*) and two witnesses and of the interested party if he wishes to be present. Upon arrival at the place where the thing or document, the inspection of which is asked, is located, the holder shall be demanded to present them under penalty that if he should not do so and it be subsequently proven that he actually had them, he shall be sanctioned under Article 407 of this Code.

If, for the carrying out of the inspection, expert knowledge is required, the Court must bring along experts in place of witnesses."

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* Matter in parentheses supplied by affiant.

(2)—English translation of Articles 399 to 407 of the Judicial Code of the Republic of Panama

"Article 403.—When the thing to be inspected be mixed with other or others in such a manner that the discovery and inspection proceeding cannot be carried out without exhibiting all of those things, the holder thereof may be compelled to exhibit all of them."

"Article 404.—If the thing which must be inspected were real estate and the petitioner should ask that the holder permit entry to take measurements, examine boundaries or any other object favorable to the petitioner, the Court shall grant the petition with the necessary directions and warnings conducive to avoiding damages to the holder."

"Article 406.—The person who not being a party to the action to which the discovery and inspection proceeding is an accessory, may have been obligated to produce any thing or document and to make them available to take copies, drawings or descriptions, has the right to claim compensation or indemnification from the party who may have asked for the inspection, unless the thing exhibited be commercial books."

The compensation or indemnificatoin must be proportionate to the benefit obtained by the petitioner and to the more or less influence which the exhibitory action may have on the outcome of the suit.

The indemnification shall be demanded by the interested party and evaluated by the court at the time of the inspection with the assistance of two experts appointed, one by each party. But the party or interested person who may claim to have been prejudiced in this connection, may ask in an ordinary court action for reparations of the injustice.

(2) English translation of Articles 916 to 926 of the Judicial Code of the Republic of Panama

"Article 407.—In all cases mentioned in this Section, the person refusing an inspection judicially ordered, or evading the same, shall be punished for disobedience and shall in addition be responsible for damages caused to the person who may have asked for the inspection if the holder were not a party to the action. But if the holder were a party thereto, upon refusing the inspection or evading it, he shall be declared convicted of the fact which the inspection was intended to prove, provided that it be fully proved in both cases that the thing, the inspection of which was refused, was in possession of said individuals."

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(2) English Translation of Articles 916 to 926 of the Judicial Code of the Republic of Panama

"CHAPTER TENTH

INSPECTION"

"Article 916.—The inspection is the examination and reconnaissance of the thing which is the subject matter of the suit or of things relating to the suit, which the court makes by itself or by means of experts, in order to judge with more certainty."

"Article 917.—Inspection may be asked in all cases where it is necessary to make the examination in order to decide on the controversy."

"Article 918.—The evidence consisting in inspection shall be effective only insofar as it may clearly permit the court to determine the fact, which is the subject of proof,

(2) English translation of Articles 916 to 926 of the Judicial Code of the Republic of Panama

by external condition of the thing that is the subject of inspection."

"Article 919.—The party holding the documents or other things which the petitioner may deem conducive to proving his actions or exceptions, is under obligation to present them before the court and to allow that copy, drawings or descriptions be taken therefrom if the interested party so asks.

If the party holding the document or the thing, the inspection of which is asked, should not present it as aforesaid, he shall incur liability equal to that established by Article 407 of this Code.

What has been said in the two preceding paragraphs shall not apply to the case of copies of authentic documents or public instruments, the originals of which may have not been lost. The proof of the loss is the burden of he who offers the evidence, if he claims that the originals do not exist."

"Article 920.—The inspection must be made upon petition by a party, or ex parte by the Court having jurisdiction. If the inspection be asked by the party before the Supreme Court, the inspection shall be made by the Justice acting on the case, unless, upon petition for the inspection, it be expressly asked that the inspection be made by all the Justices who are to decide the controversy.

If the inspection is ordered ex parte by the (Supreme*) Court, whenever it deems it necessary for the greater

* Matter in parentheses supplied by affiant.

(2) English translation of Articles 916 to 926 of the Judicial Code of the Republic of Panama

clarification of the truth, the Justices who must issue the decision must be present.

When this inspection is ordered ex parte, it may be made at any time during the litigation."

"Article 921.—In every case of inspection the tribunal, upon granting or ordering it, shall fix the day and the hour in which it must be made."

"Article 922.—The Court shall appoint two witnesses to be present at the proceedings, if there be no need for experts, but when the case should require a special, practical or scientific knowledge, experts shall be appointed in the manner provided in Chapter VI of this Title, with notice to the parties and other interested persons, unless otherwise provided expressly in this Code."

"Article 923.—When the Court or the Justice arrive at the place where the inspection is to be made, together with his Clerk and the witnesses or experts, as the case may be, he shall hear the interested parties, and shall cause the experts to examine the thing and to render their reasoned opinion."

"Article 924.—The parties present at the proceedings may make the oral observations which they may deem convenient, which shall be recorded in the minutes upon request by the party, if such observations be pertinent."

"Article 925.—Minutes shall be prepared of whatever transpired at the inspection, and they shall be signed by those who attended, which minutes will constitute evidence more or less complete according to the nature of its contents and according to the kind of affirmations which the attending experts or witnesses may make."

(3) English Translation of Articles 88 and 89 of the Code of Commerce of the Republic of Panama

"Article 926.—After taking the minutes of the inspection steps, the Court shall order that they be added to the docket. But when the inspection should bear upon a new construction, or upon a construction on the verge of collapse, the proceedings shall be held in the manner provided in Sections 4th and 5th, Chapter V, Title VIII of this Book."

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(3) English Translation of Articles 88 and 89 of the Code of Commerce of the Republic of Panama

"Article 88.—No authority, judge or tribunal may make or order any inquiry or steps for the purpose of finding out whether or not the merchant keeps his commercial accounting books in due form, nor make any general investigation or examination of the bookkeeping in the offices or bureaus of the merchants."

"Article 89.—Neither shall it be ordered to communicate, deliver or examine in general the books, correspondence and other papers and documents of merchants and brokers, except in cases of decedent estates or bankruptcy, or in case of liquidation.

Outside of these cases, inspection of specific entries in the books and documents relating thereto may be ordered only upon petition by an interested party or ex partesorder, when the person to whom the records belong may have interest or responsibility in the matter in question.

The examination must be made in the office of the merchant or broker in his presence or in that of one of his agents, and it must be limited to taking copy of the

entries or papers which may bear relation to the matter involved.

If the books are located outside of the place of residence of the judge ordering the exhibition, the latter must be made in the place where the books are located, and in no case the removal of the records to the place where the proceedings are being held may be demanded.

When a merchant keeps auxiliary books, he may be compelled to exhibit them in the same manner and in the same cases as aforesaid."

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(4) Title 26 United States Code §§ 7601, 7602 and 7604

(68 A. Stat. 901 and 68 A. Stat. 902)

"§7601. *Canvass of districts for taxable persons and objects*

(a) *General rule.*—The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

(b) *Penalties.*—

For penalties applicable to forcible obstruction or hindrance of Treasury officers or employees in the performance of their duties, see section 7212."

(4) Title 26 United States Code §§ 7601, 7602 and 7604

"§7602. *Examination of books and witnesses*

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

"§7604. *Enforcement of summons*

(a) *Jurisdiction of district court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production or books, papers, records, or other data.

(4) Title 26 United States Code §§ 7601, 7602 and 7604

(b) *Enforcement.*—Whenever any person summoned under section 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

(c) *Cross references.*—

(1) *Authority to issue orders, processes, and judgments.*—

For authority of district courts generally to enforce the provisions of this title, see section 7402.

(2) *Penalties.*—

For penalties applicable to violation of section 7602, see section 7210."

(4) Title 12 United States Code §§ 601, 602 and 604

(49 Stat. 704 and 39 Stat. 753)

"§601. *Authorization; conditions and regulations*

Any national banking association possessing a capital and surplus of $1,000,000 or more may file application with the Board of Governors of the Federal Reserve System for permission to exercise, upon such conditions and under such regulations as may be prescribed by the said board, either or both of the following powers:

First. To establish branches in foreign countries or dependencies or insular possessions of the United States for the furtherance of the foreign commerce of the United States, and to act if required to do so as fiscal agents of the United States.

Second. To invest an amount not exceeding in the aggregate 10 per centum of its paid-in capital stock and surplus in the stock of one or more banks or corporations chartered or incorporated under the laws of the United States or of any State thereof, and principally engaged in international or foreign banking, or banking in a dependency or insular possession of the United States either directly or through the agency, ownership, or control of local institutions in foreign countries, or in such dependencies or insular possessions.

Until January 1, 1921, any national banking association, without regard to the amount of its capital and surplus, may file application with the Board of Governors of the Federal Reserve System for permission, upon such conditions and under such regulation as may be prescribed by said board, to invest an amount not exceeding in the aggregate 5 per centum of its paid-in capital and surplus in the

(4) Title 12 United States Code §§ 601, 602 and 604

stock of one or more corporations chartered or incorporated under the laws of the United States or of any State thereof and, regardless of its location, principally engaged in such phases of international or foreign financial operations as may be necessary to facilitate the export of goods, wares, or merchandise from the United States or any of its dependencies or insular possessions to any foreign country: *Provided, however*, That in no event shall the total investments authorized by this section by any one national bank exceed 10 per centum of its capital and surplus.

Such application shall specify the name and capital of the banking association filing it, the powers applied for, and the place or places where the banking or financial operations proposed are to be carried on. The Board of Governors of the Federal Reserve System shall have power to approve or to reject such application in whole or in part if for any reason the granting of such application is deemed inexpedient, and shall also have power from time to time to increase or decrease the number of places where such banking operations may be carried on."

"§602. *Reports and examinations*

Every national banking association operating foreign branches shall be required to furnish information concerning the condition of such branches to the Comptroller of the Currency upon demand, and every member bank investing in the capital stock of banks or corporations described in subsection second of section 601 of this title shall be required to furnish information concerning the condition of such banks or corporations to the Board of Governors of the Federal Reserve System upon demand, and the Board of Governors of the Federal Reserve System may order special examinations of the said branches, banks, or corporations at such time or times as it may deem best."

(4) Title 12 United States Code §§ 601, 602 and 604

"§ 604. *Accounts of foreign branches; profit and loss*

Every national banking association operating foreign branches shall conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office, and shall at the end of each fiscal period transfer to its general ledger the profit or loss accrued at each branch as a separate item."

APPENDIX B

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 315—October Term, 1958.

(Argued June 8, 1959 Decided November 10, 1959.)

Docket No. 25528

THE FIRST NATIONAL CITY BANK OF NEW YORK,

Petitioner-Appellee,

—v.—

INTERNAL REVENUE SERVICE OF THE UNITED STATES TREASURY DEPARTMENT,

Respondent-Appellant.

Before:

HINCKS and LUMBARD, *Circuit Judges*, and SMITH, *District Judge*.

Appeal from the United States District Court for the Southern District of New York, Edward J. Dimock, *Judge*.

The Internal Revenue Service appeals from an order, D. C. S. D. N. Y. 166 F. Supp. 21, modifying a summons of the Internal Revenue Service issued pursuant to Section 7602 of the Internal Revenue Code of 1954 (26 U. S. C. §7602). *Reversed and remanded.*

Opinion

ROBERT J. WARD, Asst. U. S. Attorney for the Southern District of New York, N. Y. (Arthur H. Christy, U. S. Attorney, S. D. N. Y., New York, N. Y., on the brief), *for respondent-appellant.*

JOHN A. WILSON, New York, N. Y. (Shearman & Sterling & Wright, Michael J. DeSantis, and MacIlburne Van Voorhies, New York, N. Y., on the brief), *for petitioner-appellee.*

HINCKS, *Circuit Judge:*

In this proceeding the First National City Bank of New York (hereinafter called the "Bank") applied to the District Court to vacate or modify a summons to appear, testify, and produce books served on it by the Internal Revenue Service (hereinafter referred to as the "Service") under 26 U. S. C. §7602. The summons called for the production before the Service in New York City of certain bank records relating to the account of Atlanta Corp. Ltd. (hereinafter called "Atlanta"), a Panamanian corporation with offices in New York City and Panama, Republic of Panama, whose tax liability was under investigation. Certain records in the Bank's New York City files were produced, but the Bank declined to produce other records, contending that they were physically located at its branch bank in the Republic of Panama, and hence beyond the reach of the subpoena. Nonproduction was justified, said the Bank, first, because the records were not in its possession, custody, or control; second, because the production of such records without Atlanta's consent or an order of a Panama court would violate sound national banking practice; and third, because such production would also violate the constitution and laws of the Republic of Panama and established principles of international comity.

The District Court, relying on *In re Harris*, D. C. S. D. N. Y., 27 F. Supp. 480, modified the summons so as to require the production of local records only. 166 F. Supp. 21. On this appeal the Service argues that the *Harris* case was erroneously decided; that the Bank's control over the subject records has been sufficiently shown; that no showing has been made that either the constitution or the laws of Panama or international comity prevent production; and that compliance with the summons should be ordered upon reversal of the decision below. These contentions we sustain.

It has long been held that there is a presumption that a corporation is in the possession and control of its own books and records. *In re Ironclad Mfg. Co.*, 2 Cir., 201 F. 66. Clear proof of lack of possession and control is necessary to rebut the presumption. A national bank, incorporated under the laws of the United States, would seem to be just as subject to the stated rule as any other corporation, unless there is something in the federal law regulating the conduct of such banks which either negatives the existence of any such presumption or rebuts it. The Bank insists that the presumption of control is negatived by 12 U. S. C. 604, which we set forth in the margin.[1]

The "control" over its records upon which is founded the obligation of a corporation to produce them upon summons or subpoena *duces tecum* is not an esoteric concept. Any officer or agent of the corporation who has power to cause the branch records to be sent from a branch to the home

[1] U. S. Code, Vol. 12, Sec. 604, reads as follows:

§604. *Accounts of foreign branches; profit and loss*

"Every national banking association operating foreign branches shall conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office, and shall at the end of each fiscal period transfer to its general ledger the profit or loss accrued at each branch as a separate item."

office for any corporate purpose, surely has sufficient control to cause them to be sent on when desired for a governmental purpose properly implemented by a subpoena under 26 U. S. C. §7602. In this case, the District Court recognized the existence of actual, practical control by the Bank over its Panamanian branch records and we think that finding was right. *In re Rivera*, D. C. S. D. N. Y., 79 F. Supp. 510; *Hopson v. United States*, 2 Cir., 79 F. 2d 302. See also *S. E. C. v. Minas De Artemisia, S. A.*, 9 Cir., 150 F. 2d 215.

The Bank's contention that the effect of 12 U. S. C. §604, especially as interpreted in *In re Harris*, *supra*, was to deprive it of sufficient control over records in Panama to be subject to the subpoena, was accepted by the court below. This ruling, however, we think was erroneous. Section 604, in terms and in intent, does not support the Bank's conclusion. As argued by the Service, §604 is nothing more than a "bookkeeping" statute, designed to make examination into the financial condition of national banks, particularly the foreign operations of such banks, as simple as possible. Reduced to its simplest terms, it is an instruction to the national banks operating foreign branches to keep separate *accounts* for each such branch, and not to lump the *accounts* together or to include them in the accounts of the home office.

Moreover, §604 with the companion Sections 601 to 603, of Title 12, all stem from Section 25 of the Federal Reserve Act of 1913, 38 Stat. 271, which under the caption of "Foreign Branches" shows not an intent to insulate the records of foreign branches from official scrutiny but, on the contrary, unmistakable intent that the branches shall report to the Comptroller of the Currency and shall at all times be subject to examination by the Federal Reserve Board. Indeed, Report 69, House of Representatives, 63rd Congress, 1st Session, accompanying H. R.

7837 which became the Federal Reserve Act of 1913, stated as the legislative objective that branch banks "shall be closely controlled by home institutions" even though the branches should conduct "their affairs separate from those of the home office in order that there may be no difficulty in ascertaining at any moment the distribution of the business of the institution."

It is true that relying in part on §604 courts have held that in various commercial transactions between a branch bank and its home office the rights involved are to be determined as though the branch was acting at arm's length as an independent entity. See *Pan-American Bank & Trust Co.* v. *National City Bank*, 2 Cir., 6 F. 2d 762, cert. denied 269 U. S. 554. But from such doctrine it does not follow that in other situations not involving an arm's length relationship the manager of a foreign branch any more than the manager of a domestic branch or, indeed, an officer of the home office, is beyond the control of the Board of Directors who appointed him. To the extent that *In re Harris* is in conflict with this conclusion, it is overruled.

Finally,[2] the Bank argues that production of the branch's records located in Panama would require action by personnel in Panama in violation of the constitution and laws of Panama. If such were the fact we should agree that the production of the Panama records should not be ordered. *S. E. C.* v. *Minas De Artemisia*, *supra*. However, the only evidence of that fact was contained in the affidavit of the Bank's expert in Panamanian law which in our view constituted insufficient basis for nonenforcement of the subpoena. His conclusion of constitutional violation was based on Article 29 of the Constitution which provided

[2] The contention that power to enforce the subpoena would conflict with sound banking policy we think so lacking in substance as to deserve no discussion

that "Correspondence and other private documents are inviolable and may not be seized or examined except by provision of a competent authority and by means of legal formalities. * * *" Assuming that this provision affords privilege against disclosure in favor of those whose affairs are the subject-matter of the disclosure, such as Atlanta, there is no showing that the Bank may invoke Atlanta's constitutional privilege as it seeks to do. Assuming, on the other hand, that this provision affords a privilege against disclosure to bystanders, such as the Bank, who have information relating to the affairs of others, there is no showing that criminal sanctions will attach if the Bank waives its privilege either voluntarily or at the command of its sovereign. Moreover, this is a case apparently falling within the stated exception—a subpoena issued by an officer of the United States Treasury Department under the control of a United States court and subject to all the "legal formalities" and safeguards of 26 U. S. C. §§7602-7605. The Constitution did not specify that the prohibition extended to the sovereign, either Panama or a foreign sovereign, or that the exception was limited to a *Panamanian* authority or *Panamanian* legal formalities. Nor was there evidence that such was its effect.

The contention that compliance with the subpoena would involve a violation of Panamanian statutory law was based largely[3] on Articles 88 and 89 of the Panamanian Code of Commerce which banned "any general * * * examination of the bookkeeping in the offices * * * of the merchants." When the Republic of Panama granted its license for the Panama branch it must have known that the Bank was

[3] The Bank's expert also points to the disclosure provisions of the Panamanian Code of Civil Procedure. But certainly these procedural provisions do not control disclosure pursuant to a subpoena of the United States pursuant to federal statute. Moreover, voluntary disclosure, not obtained through pursuance of these procedural provisions, has not been shown to be the subject-matter of any criminal sanction.

created under, and subject to, §25 of the Federal Reserve Act of 1913, 38 Stat. 273, whereby it was required to furnish information concerning the condition of the branch to the Comptroller of the Currency of the United States and to submit to examination on order of the Governors of the Federal Reserve System. Thus the very fact that the Republic of Panama licensed an American bank, which was subject to this provision of American law, to carry on a branch in Panama is some ground for inference that the prohibitions of the Panamanian Constitution and statute on which the Bank relies did not extend to examinations by, and disclosures to, duly authorized officers of the United States government. If the Bank cannot, as it were, serve two masters and comply with the lawful requirements both of the United States and of Panama, perhaps it should surrender to one sovereign or the other the privileges received therefrom. We hold now, however, only that the *ex parte* proofs submitted by the Bank were insufficient to excuse compliance.

We reverse and remand with a direction to reinstate the subpoena as it originally issued and in the event of noncompliance to explore in contempt proceedings under 26 U. S. C. §7604 the ability of the Bank to comply without subjecting its personnel to criminal sanctions under Panamanian law.

Ordered accordingly.

APPENDIX C

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of November one thousand nine hundred and fifty-nine.

Present:

HON. CARROLL C. HINCKS,

HON. J. EDWARD LUMBARD,

Circuit Judges.

HON. J. JOSEPH SMITH,

District Judge.

In the Matter of

the Application of the FIRST NATIONAL CITY BANK OF NEW YORK,

Petitioner-Appellee.

To vacate a summons to appear, to testify and to produce books, etc., relating to the Atlanta Corporation, Limited

INTERNAL REVENUE SERVICE OF THE UNITED STATES TREASURY DEPARTMENT,

Respondent-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the

Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and the action be and it hereby is remanded, with a direction to reinstate the subpoena as it originally issued and in the event of noncompliance to explore in contempt proceedings under 26 U. S. C. 7604 the ability of the Bank to comply without subjecting its personnel to criminal sanctions under Panamanian law, in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

APPENDIX D

Opinion of the District Court

=515

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

=24587

In the Matter

of

THE APPLICATION OF THE FIRST NATIONAL CITY BANK OF NEW YORK,

Petitioner,

TO VACATE A SUMMONS TO APPEAR, TO TESTIFY, AND TO PRODUCE BOOKS, ETC. RELATING TO THE ATLANTA CORPORATION, LIMITED

M 18-304

INTERNAL REVENUE SERVICE OF THE UNITED STATES TREASURY DEPARTMENT,

Respondent.

APPEARANCES:

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Attorney for Respondent

ROBERT J. WARD, Esq.,
Assistant United States Attorney,
of Counsel.

OPINION

DIMOCK, D. J.

This is a motion by The First National City Bank of New York, hereinafter petitioner, to vacate or modify a summons of the Internal Revenue Service dated June 5, 1958. The summons was issued pursuant to section 7602 of the Internal Revenue Code, 26 U. S. C. 7602, and calls for production of certain bank records relating to the account of a corporation that is under investigation by the Internal Revenue Service.

Petitioner cites Judge Patterson's opinion in *In re Harris*, D. C. S. D. N. Y., 27 F. Supp. 480, in support of its contention that the records are not so within the control of the main office in New York as to be subject to production under the summons. I have no disposition to depart from the *Harris* case and it is on all fours with the instant one except that there the command was that of a subpoena duces tecum in a bankruptcy proceeding while here the command is that of a Treasury Department summons. My question therefore is whether the fact that it is the Government rather than a trustee in bankruptcy who wants the records ought to change the result.

While the cases speak of "control" as the touchstone that word is not used literally. In the *Harris* case the Chase National Bank was relieved of the command of a subpoena to produce records of its London branch on the ground, p. 481, that they were "not so within the control of the main office here as to be subject to production by

subpoena duces tecum served here." I cannot believe that if the president of the bank had wanted those records brought to the main office for the bank's own purposes he would not have had sufficient "control" of them to get them here. The *Harris* case represents instead a liberal construction of section 604 of Title 12 U. S. C. which provides that "[e]very national banking association operating foreign branches shall conduct the accounts of each foreign branch independently of the accounts * * * of its home office". Judge Patterson said that those words led to the conclusion that the foreign records were not sufficiently within the control of the main office to be subject to subpoena. It is those words therefore that give the immunity. I cannot see that they have any less strong tendency to immunize papers when sought by the Government than when sought by a trustee in bankruptcy. Nor is there any other statute which purports to give the Government any greater power of discovery than a private citizen armed with a subpoena duces tecum. The Government makes much of section 7602 of title 26 under which it proceeds but that section does no more than give to the Government during the course of its investigation rights to the production of papers similar to the rights possessed by the *Harris* case's trustee in bankruptcy armed with a subpoena duces tecum.

I hold therefore that section 604 gives to records of a foreign branch bank the same immunity from discovery whether discovery is sought by the Government under a Treasury Department summons or by a private citizen under a subpoena.

The summons is modified so as to command the production of only those records which are located in New York.

Dated: September 22, 1958.

E. J. Dimock
United States District Judge